UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JADE WILCOX, on behalf of herself, and all others similarly situated, Plaintiff, vs. SWAPP LAW, PLLC, dba CRAIG SWAPP AND ASSOCIATES; and JAMES CRAIG SWAPP, individually, Defendants.	Case No. 2:17-cv-00275-RMP December 13, 2018 Spokane, Washington Motion Hearing Pages 1 - 57

BEFORE THE HONORABLE ROSANNA MALOUF PETERSON
UNITED STATES DISTRICT COURT JUDGE

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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

(Court convened on December 13, 2018, at 9:30 a.m.)

THE COURTROOM DEPUTY: I have *Jade Wilcox, on behalf of herself, and all others similarly situated, versus the Swapp Law, PLLC, et al.*, Case No. 2:17-cv-275-RMP; time set for motion hearing.

Counsel, would you please make your appearances for the record?

MR. BARTON: Good morning, Your Honor. Joseph Barton on behalf of plaintiff, Jade Wilcox. I may be listed as Robert -- Robert Barton, but I go by my middle name. It's Robert Joseph Barton.

THE COURT: Well, I guarantee I'll only call you Mr. Barton; so okay.

MR. BARTON: That's fine. With me is Thomas Jarrard and Marcus Sweetser.

THE COURT: Okay.

MS. DUFFY: Your Honor, for the defense, Barbara Duffy and Ryan McBride from the Lane Powell firm.

THE COURT: All right. Good morning. I have read all of the briefing and reviewed the documents. I'm just pulling up my notes here.

So Mr. Barton, your motion to certify class?

MR. BARTON: Yes, Your Honor. Good morning, Your Honor.

THE COURT: Good morning.

MR. BARTON: As I believe this Court is well-aware, this case involves the fault purchase of police traffic collision reports, also known as PTCRs or just collision reports, by defendants for the purpose of conducting marketing. Plaintiffs contend that those collision reports were created using information that was derived from motor vehicle records; and as a result, the defendants obtaining and using those reports and the information that was contained in it therein for marketing purposes violated the DPPA, the Driver's Personal Protection Act.

We are here this morning because the plaintiff has requested the Court certify a class, and the class consists of all drivers who are listed on those collision reports where the information came from certain motor vehicle records, namely driver's license, registrations, or data, whether the data, the bar code data or the database, and they -- those reports were obtained by Swapp, Mr. Swapp or the Swapp Law Firm.

We have excluded people who were either clients of the Swapp Law Firm, employees of the Swapp Law Firm, or even drivers who are on a collision report where they had a client on the report, and we've also excluded from the class people who provided written consent.

The -- in this case, there is no question the defendants repeatedly and systematically purchased police traffic collision reports from the Washington State Patrol. They admittedly

purchased during the time period, which is the class period, which is September 1st, 2013, through June 23rd, 2017, 9,000 such reports. The purpose, I don't think there's any dispute, was to extract information, the personal information of drivers that were involved in motor vehicle accidents, and to send business solicitation letters to those drivers from the Swapp Law Firm to solicit business.

The law enforcement officers across Washington state, whether or not they were in Washington State Patrol or at other law enforcement agencies, use standard procedures and standard forms to prepare the police traffic collision reports. They were using the same form, whether it was prepared electronically or on paper form. 95 percent of those law enforcement agencies across the state of Washington use an electronic program called SECTOR to prepare that, to prepare the forms and prepare the collision reports.

Law enforcement officers across the state of Washington were also uniformly trained to and did uniformly or routinely complete those collision reports, and what the preference in terms of how to complete them was to swipe in this order: the bar code data off the registration, the bar code data off of the driver's license; if that was not available, to manually input the information on the front of the license or the front of -- actually, the preference is the manual -- the manual information off the registration and then the manual -- the information off

the front of the driver's license.

If that was not available for some reason, somebody didn't have those documents, they could ask the information from the driver. They were instructed to perform a driver's check. That was the preferred procedure, or they could perform a driver's check. And what a driver's check is, is either accessing database information either directly from a computer, if they had a computer in the car, which many of them do -- I think the overwhelming majority have computers in the car -- or they can call essentially back to headquarters, and headquarters at their police department can run that check.

There is -- they keep a record of whether or not there is a check that is done. There is a dispute of whether or not there is a record, of whether or not the SECTOR system keeps a record of whether or not it was manually created or electronically created. But what is not disputed is that the DOL does keep address information going back seven years as to when people make changes and what the -- so if somebody made an address change in their -- to the DOL, whether or not that can match up to the accident report, that -- there is information that we can check as to whether or not the DOL data matches up with the license -- I'm sorry, the address information on those collision reports.

The bar code data, I think we explained, as I explained on the motion to dismiss, contains information that -- from --

populated from the DOL database. The DOL considers that information to be confidential personal information. The driver's license and registration and all the data on both documents are considered by the Department of Licensing to be their property and considered to be protected personal information that cannot be used except for government purposes or certain specified purposes. The Department of Licensing trains law enforcement officers that such personal information derived from driver's license and registrations cannot be used for other purposes.

Rule 23 creates a categorical rule that if you meet the requirements under Rule 23, a class must be certified. The Supreme Court in *Shady Grove* explained that if the Court finds the standards are met, the requirements are met, the Court does not have discretion to deny certification for some other reason. The Supreme Court and the Ninth Circuit have repeatedly explained that you can consider the merits questions but only to the extent necessary to resolve whether or not Rule 23 and its standards have been met. What is not a relevant consideration on Rule 23 is whether or not plaintiff will prevail on the merits. You can certify a class even if you were sitting here thinking plaintiff is not going to prevail on the merits. It is fine to certify a class where you believe the plaintiff should lose or will lose.

In this case, defendants make a request that the Court

essentially determine and make a determination of the merits with respect to whether or not certain information qualifies as a motor vehicle record. Plaintiffs believe, based on the Ninth Circuit and the Supreme Court juris prudence, that is an improper request, and the Court should not do that.

With respect to the elements of Rule 23, the defendants do not contest the element of Rule 23(a)(1); that is a joinder is impractical because there's a sufficient number of class members. And defendants do not contest that Rule 23(a)(4), the adequacy of the plaintiff or the adequacy of counsel exists.

In making their arguments opposing class certification, defendants largely rely on out-of-circuit cases. They -- not generally address the cases that plaintiffs cite, and really what defendants' argument boils down to are three basic arguments. First, defendants argue that the facts underlying the claims of the class are too variable; and despite the fact that there is evidence of uniform forms, uniform training, and uniform procedures across the state, what the defendants want to have this Court believe is that police officers, who at least I consider to be one of those professions where uniformity and procedures are a part and parcel of their profession, they want to have the Court believe that police officers ignore directives and populate personal information in those collision reports in a highly variable manner, contrary to the systemized and well-documented procedures that are supposed to be used.

What they also -- they also argue that class-wide resolution of these issues is not superior. What they're essentially arguing is it would be better for 9,000 separate suits alleging identical conduct by the defendants and identical statutory damages to be brought. And the third argument concerns the typicality of Ms. Wilcox, and they argue that her memory lapse, which she -- between the time she sent in interrogatory and the time of her deposition where she came out and explained the reasons for and what triggered her memory disqualifies her because it makes her not credible.

And I think what underlies most of these arguments, particularly their first argument, is an argument that the Ninth Circuit has rejected, and it is based on the fallacious premise that if actual class members cannot be later determined except on a report-by-report basis, class certification is not appropriate. And what the -- the Ninth Circuit specifically addressed this in the context of a class definition, and so defendants have transformed this argument away from the definition of the class itself and used it to undermine and buttress other arguments, but it's equally wrong when they address it as the typicality or predominance.

With respect to the definition of the class itself, the Ninth Circuit's only requirement is that it be defined by objective criteria; that is the *ConAgra* case. The Ninth Circuit has affirmatively and definitively rejected that a -- a need to

show administrative -- administrative feasible way to identify class members other than by self-identification. And if you look at the *ConAgra* case, I think that is illustrative of what the Ninth Circuit's position is. That is a case in which it was a consumer case alleging deceptive practices in the sale of vegetable oil through, of course, grocery stores where consumers buy them, and the Ninth Circuit readily admitted there was no way to identify class members because class members don't save grocery receipts for -- for when they buy cooking oil or vegetable oil, but that did not prevent class certification.

What we have here is we have objective criteria, and defendants do not suggest that our definition in -- in the class definition itself is not based on objective criteria, and there's three portions of it. You can break it down as three parts. Is the driver on a collision report the defendants obtained between September 1st, 2013, and June 23rd, 2017? We can look at the reports. We have records as to when they obtained what reports.

The second is whether or not the information originated from a DOL record; and the plaintiff's position is whether it comes from a driver's license, bar code data, registration, whether it's on the front or the data or whether it comes through the database, all of that is protected information.

And the third is is the person not a client of Swapp, a Swapp employee, and did they not provide written consent?

Defendants really only contest the second portion of it, but their -- their premise is that you need to have absolute certainty at the time of class certification to identify all the class members, and that is not a requirement. That's exactly contrary to what *ConAgra* says, and the specific line in ConAgra is a warning that the perfect should not be the enemy of the good. What the Ninth Circuit is saying is perfect accuracy, even later in the process, is not required to identify all the class members. What we do know here is we know what the systems were to create these reports, and we know that their -- there were standard procedures to develop these reports.

Even if we needed to establish the identity of class members, there are multiple ways to do that here. We can do that through the standard procedures of how they were created, looking at the data from the bar code; and the -- if there's no bar code, from the driver's license; and if there is a difference or new information, officers are trained to check that there is a new -- new address information.

But perhaps the best way is that we can compare, as I mentioned earlier, the Department of Labor -- sorry, Department of Licensing records as to when people submitted address change and what the address change was and what the address was that the Department of Licensing had and compare that to the address on the report itself. If it doesn't match the registration or -- the address on the registration or their address of the

driver's license, then compare that to the -- what's on the accident report.

As I mentioned earlier, there's testimony that there is in fact a code in the SECTOR database which would indicate whether or not the report was created using the bar code data. I understand the defendants have now submitted an affidavit from somebody after a deposition saying that doesn't exist, but if we can go out and find that exists, that is also a helpful way.

The fourth way which the Ninth Circuit allows is for the class members to submit their own information. They can submit affidavits explaining what they did at the scene. Did they just provide their driver's license? Did they just provide their registration? Did they only confirm that that was -- that's the only information? The defendants -- what the Ninth Circuit then says is after liability is established, the defendants are free to then go challenge these class members on an individual basis, but that is a process the Ninth Circuit allows to allow the identification and certification of the class.

I'll skip over -- because the defendants don't contest the joinders and practical, I'll skip over to commonality and what commonality requires. Rule 23(a)(2) is only a single question of law or fact. It does not require that all or even a majority of the issues be common so long as there is a central issue that can be decided in one stroke, and that central issue does not need to resolve the entire case.

Plaintiffs have identified three common questions on liability: Number one, the question of whether or not information in the collision reports are derived from motor vehicle records. Question two, did defendants knowingly obtain that information? And question three, did they obtain it for a permissible purpose? Defendants really only contest issue number one, and the existence of those other two will be sufficient to certify a class.

Defendants don't contest that there are standard procedures, and there are standard procedures in how law enforcement created the reports. There are standard procedures in terms of Washington State Patrol collecting and selling the reports, and there is a systematic procedure that the Swapp Law Firm had in buying and using them for marketing. That creates a standard course of conduct, and that, in and of itself, creates commonality.

The defendants' real dispute is not whether or not there was a common course of conduct here. Their really dispute is about whether or not bar code data and information on the front of the driver's license and registration constitute protected personal information under the DPPA. That's their real dispute. That is a -- that creates a common legal issue, and that common legal issue supports class certification. Remember, it's a common question of law or fact. Common course of conduct with a question of -- that the defendants want to raise of whether or

not this is protected information of the DPPA creates a common issue of fact.

Moving on to Rule 23(a)(3), that creates -- that sets the standard of whether or not there are claims or defenses that are typical. Are the plaintiff's claims or defenses typical? With respect to plaintiff's claims, typical claims only need to be reasonably co-extensive. When you have a policy or practice that affects the class members, typicality exists. Again, it's the common standard course of -- standard course of conduct. We've got creation of collision reports with standard forms and procedures, the standard practice of selling them and standard practice by which Mr. Swapp bought them and used them for marketing purposes and the Swapp Law Firm.

Despite those practices, the defendants say there's no typical plaintiff. That's their argument. Their argument is there's no one in this class that could be a typical plaintiff. Here is the problem with their arguments. They, first of all, factually ignore -- or they want the Court to assume that law enforcement is ignoring their training, ignoring the actual manuals.

They also ignore that typicality has a permissive standard, and here are -- the Ninth Circuit in the *Torres* case set forth the measures of typicality and the questions that the *Torres* case asked. One, did other class members have a same or similar injury? That's question one. Question two, is it based on

conduct not unique to the plaintiff? And question three, are other class members injured by the same conduct? All three of those are met here.

The question is -- we know that all -- the other class members, 9,000 people, had their reports obtained by -- by the Swapp Law Firm. The plaintiff complains of that conduct and the sending of marketing materials, and it all rises out of these same practices.

The Ninth Circuit also said in *Torres* even a wide variation of a fact pattern is okay. It's still permissible to find typicality. So what do the -- what do the defendants do? They ignore the Ninth Circuit standards. What they want to have the Court look at is a case called *Pavone versus Meyerkord* out of the Northern District of Illinois. If you look at the facts there and what the evidence that was developed or not developed in that case, it's a startling difference.

The class certification there was based on an unsupported assertion that all reports -- or reports would contain personal information. The class was not limited to drivers. It was not limited to reports with any -- derived from motor vehicle records, and there was no evidence of any systematic methods of creation of those reports.

The defense also point to a defense that they say -- claim impedes typicality. Under the Ninth Circuit standard, a defense only impedes typicality if it's unique to the plaintiff and it

threatens to become the focus of litigation. It is a rare circumstance that credibility undermines a class rep., and it really needs to go to the heart of the claims. Petty credibility challenge don't suffice to do that, and it's an interesting way that the defendants challenge this. They challenge it under typicality when it's normally challenged under adequacy, but defendants don't challenge plaintiff as an adequate class representative here.

What they really focus on is a memory lapse that plaintiff had where she was very forthcoming in her deposition of what happened and explained how her memory was -- how her memory came back to her, and this happens. And what happened in this case -- what they're complaining about is in an interrogatory, she had responded that at the scene of the accident, she had provided the officer with her driver's license, with her registration, and that she had confirmed that the address information on both were accurate.

She had forgotten that her -- the address on her driver's license was in fact different than the one on her registration, but when she saw her prior license and her prior registration, which she didn't have and she had to go back and get because she no longer had the car -- and I'm amazed that she kept her prior driver's license. When she saw those, she realized that -- she remembered that what she in fact told the officer was that her registration address was current and up-to-date and the driver's

license was different.

That is not a credibility issue. That's the way people's memories work. When you see documents, when you see information, your memory is triggered. It is the way -- ask any psychologist. It is the way people's memories work. We don't necessarily think lineally -- lineally, in a lineal -- lineal fashion. That's the way people's memory loss -- this is not a credibility issue and is certainly not -- when she remembered what exactly happened does not affect the claims in this case and should not be some issue that is going to prevent her to be a class rep. or should come up at trial.

Briefly with respect to the adequacy of plaintiff and plaintiff's counsel, as I said, defendants do not suggest that there is some conflict among the class, and there's really two questions on adequacy: One, are there any conflicts that plaintiff or plaintiff's counsel have; and two, will plaintiff and her counsel vigorously prosecute the claims?

Defendants don't suggest that there's any conflict. They do not suggest that plaintiff or her counsel will not vigorously prosecute the claims. Defendants have explicitly said that they believe my firm, the Block and Leviton firm, are adequate in our papers. I've submitted my experience, my firm's experience handling numerous large-scale complex litigation and class litigation, including trials that I've successfully tried, class-action cases.

They neglect to -- we have also asked that Mr. Jarrard be appointed as co-lead class counsel here. Defendant has not addressed Mr. Jarrard's qualifications. They are also in our papers. I have personally worked with Mr. Jarrard on several class actions that were successfully resolved, including one recently against the Washington State Patrol that was resolved over in state court and others. Based on his background and experience, he should also be appointed co-lead counsel.

With respect to Rule 23(b), plaintiff has requested this case be certified under Rule 23(b)(3), which has two components. The first is whether or not common issues predominant -- predominate, and what the Ninth Circuit has said has sort of independent ways to determine whether or not there is predominance of common issues over individual ones, is if the common issues are either more prevalent or more important than the individual ones, you have predominance.

The second thing to look at -- and these, I think, are independent and separate ways the Ninth Circuit has identified how to -- or instructed how to identify predominance. The second way is if those questions prevent -- present a significant aspect of the case to be resolved for all class members, you have predominance.

The third way to look at predominance: If you have a common nucleus of facts and potential legal remedy, you have predominance. And the fourth way to look at predominance: Is

there a common course of conduct that affected all class members? If there is, you have predominance. And I think if you look at those, we have those met readily in this case.

What predominance does not require, it does not require all aspects of the case be subject or susceptible to common proof. The Supreme Court recognized that in the *Amgen* case. They recognized that in the *Tyson Food* case where they explicitly said there can be important issues that are tried separately.

Even if that's so, you still have -- you can still have predominance. And that, I think, is where the defendants erred. They assume that all issues in the case have to be common in order to meet predominance. That's not predominance.

The important issues are the three issues that I mentioned earlier. They were mentioned/discussed on commonality. Those are the three important issues. Defendants do not dispute that those are the most important issues in this case, and those issues predominate throughout this case.

The determination of the legal issue that defendants want and the plaintiff wants to get determined in this case, that determination alone meets the predominance requirement. The fact that we have a standard set of procedures and practices with respect to that issue, namely whether or not the driver's license, registration, and bar code data are derived from motor vehicle records and qualify under the DPPA, that creates predominance in this case.

The defendants' primary argument is that if the class includes some drivers where the information did not come from motor vehicle records, that creates a problem. That is contrary to what the Supreme Court decided in the *Tyson Food* case. It's contrary to what the Ninth Circuit said in the *ConAgra* case.

And again, the defendants' theory on this is counterfactual and based largely on speculation. They want the Court to believe that there are -- police officers did not follow general standard procedures, and they want to assume that there may have been some errors where people didn't follow them 100 percent of the time, but that does not undermine predominance. The Supreme Court recognized in the *Halliburton* case the defendant's ability to pick off certain class members and determine that they were not -- should not recover does not undermine predominance.

And I think the best illustration of that is the Sixth Circuit case in *Young*, and it recognized that there can be irregularities. There always are irregularities if you have standard procedures, but the fact that there are -- that humans make mistakes and they don't always follow standard procedures does not undermine predominance when you have a systematic set of procedures, when you have systematic set of practices.

And that is expressly understood and explained by the Ninth Circuit in the *ConAgra* case where they explain the defendant can raise individual challenges after the determination of liability on a class-wide basis, and this, if you think about it, is why

what the Ninth Circuit explains is a course of conduct. If you prove a course of conduct, a set of practices, of common practices, that is enough to establish predominance.

In response to that, what the defendants rely on is, again, they turn to the *Pavone* case, the district court case out of the Northern District of Illinois, and I think there are four -- at least four important differences with respect to predominance to look at. In *Pavone*, there's no common technology. Here, we have the SECTOR system and a set of standard forms. In the *Pavone* case, the law enforcement agencies across Illinois used different forms with different fields. We have a standard form.

In the *Pavone* case, there was no evidence of any uniform training, no evidence of uniform manuals. There are no standard practices. That is contrary to what we have here. And there was apparently very little evidence or discovery that was developed in that case, contrary to what we did here.

With respect to the second and third issues, defendants don't contest whether or not the -- the common issues predominate in those. What they do raise is an issue about damages, and they contend that individual damage assessments will defeat predominance here, but plaintiff is seeking statutory damages for the class. That calculation is straightforward. It's 2,500 per. That is what the statute says.

Now, what defendants argue is that you need proof of actual

damages, and the plaintiff is going to have to come in and prove that each individual class member was -- had actual damages in order to recover statutory damages. That is contrary to the two circuits that have decided this issue. Both circuits, the Ninth Circuit -- I'm sorry. The Eleventh Circuit and the Third Circuit have said that's not the case. And interestingly, the defendants cite the *Truesdell* case; and if you read the Eleventh Circuit opinion, the Eleventh Circuit again for the third time rejects that argument and says proof of actual damages is not necessary. Their -- defendants' own case rejects that.

But even if we had to do that, the Ninth Circuit has repeatedly said individual damage calculations do not defeat predominance. You can have predominance on liability questions and individual damage calculations, and that does not defeat predominance.

Turning to the second element of Rule 23(b)(3), the question is whether or not the class action here is superior to other methods to fairly and efficiently adjudicate these claims. That's the test from *Wolin* in the Ninth Circuit. There are really -- there are four factors that are set out in the rule. One, do plaintiffs have an interest in controlling this case? Courts have generally recognized $2,500 is too small to litigate, and class members therefore do not have an interest in controlling the claims.

The second, third, and fourth factors are uncontested by

the defendants, whether or not there's any other litigation raising these claims; there are none. Is this forum the appropriate forum? It is for multiple reasons. Swapp, Mr. Swapp and the Swapp Law -- the Swapp Law Firm has an office here. The class members, their accidents occurred in this district. The Swapp Firm was looking for drivers who had accidents in the Eastern District of Washington. And the fourth factor is whether or not there's any manageability issues, and the defendants have not suggested there is.

What defendants do instead suggest are -- they make two arguments that perhaps indirectly address plaintiff's or the class members' interest in controlling the case. They argue that many class members are ignorant of the fact that their rights have been violated, either because Swapp -- the Swapp Law Firm only obtained the reports but didn't actually use them or they have no understanding that -- of where -- that their personal information was used, but the fact that class members are ignorant about their rights actually supports superiority. Courts generally consider the fact that class members don't have incentive or don't even have knowledge to pursue their rights as a reason to certify a class, not to not certify one.

The defendants, in response to that, cite the *Truesdell* case, the case from the Middle District of Florida, with an unusual fact pattern. The fact pattern there was a government employee who had access, by reason of his job, to certain

confidential information and protected information, used it to search for women that for some reason he wanted to find where they lived and other personal information. The plaintiff then sued the government agency for failing, basically, to monitor and control his activities.

And it really -- I think it's a poorly-reasoned decision, but the -- it really comes down to an unusual fact pattern, and what -- the most important part of that decision is the court distinguished the facts in that case from the situation involving a mass marketer who used records to communicate with persons to sell them something. Under the *Truesdell* court's own logic, superiority would be met here.

The second argument that defendants made is that they claim that because there are attorney's fees that are available to -- to class members here, they each could bring their own claims. Generally in this circuit, courts have concluded superiority is not lacking merely because of the availability of potential attorney's fees. And two circuits addressing this issue have suggested there may be discretion in terms of the amount or the award of attorney's fees. I'm certain that if 9,000 people were to bring claims, the defendants would certainly be arguing that they should not get full attorney's fees for bringing these duplicative claims.

Defendants also don't explain how having multiple attorneys or multiple attorney's fees and duplicative litigation is

somehow more efficient. It's contrary to that whole idea in terms of what is the most efficient way to resolve this claim.

Finally, the defendants ask this Court to decline to certify based on the size of the possible damages in this case, but the Ninth Circuit has rejected that. What the Ninth Circuit said in the *Bateman* case is even if a class who had rendered defendant's liability enormous, it's not an appropriate reason to deny class certification. In fact, the Ninth Circuit in *Bateman* reversed a class denial that was done on that basis, and that -- this argument also contradicts the Supreme Court's holding in *Shady Grove*. The Supreme Court, as I mentioned in the beginning, held that if the standards are met, the class must be certified.

There is no evidence here about the size of a potential amount of damages versus the assets of the Swapp Law Firm. They have not put any in, and we have not conducted any discovery about that yet. There's also no evidence that with respect to the DPPA that Congress wanted to either curtail class litigation or curtail the amount of damages that could be awarded in class litigation.

But we know from other statutes, such as the Truth and Lending Act, that Congress knows how to do it. And in the Truth and Lending Act, you can get statutory damages; you can get actual damages. But if you bring a class action under certain provisions of the Truth and Lending Act, Congress has capped the

damages at $500,000. So there is no evidence of that here.

There is no evidence to support a reason to deny class certification here based on that argument. And Your Honor, unless you have questions, I would --

THE COURT: I do not. Thank you.

MR. BARTON: Thank you.

THE COURT: Ms. Duffy?

MS. DUFFY: Thank you, Your Honor. I'd like to -- as the Court knows, we briefed all aspects of Rule 23 in our opposition brief, which admittedly was quite dense. But what I would like to spend my time on in oral argument this morning is an area where plaintiff -- where plaintiff stopped, which is the notion of the (b)(3) criteria, and in particular, the predominance criteria of (b)(3).

Although related to commonality, predominance is far more demanding, says our Supreme Court. Courts should consider, among other things, the likely difficulties in managing a class action. The court has said in the *Zinser* case in the Ninth Circuit that if the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b) action would be inappropriate, and if -- and common questions predominate only if -- only if the critical issues are subject to generalized or common proof as opposed to an individualized inquiry.

Now, Your Honor, a number of critical issues, we contend,

involve individual issues, and those individuals issues predominate over common ones. In particular, the issue we'd like to talk about most is that the foundation of both plaintiff's class definition and her ability to establish liability under the DPPA, specifically whether the source of the information in the PTCR, the report, is a Department of Licensing record under the DPPA. In other words, is it a motor vehicle record under the DPPA? If for any particular driver listed on the -- on the PTCR, whether the source of the information was protected by the DPPA, because if not, that driver falls out of the class and there's no DPPA liability.

Now, Your Honor, at this stage of the proceedings, the issue is not whether the plaintiff can actually meet her -- meet her burden of proof at trial. We understand that. But the issue is whether this critical issue of liability can be proven by the plaintiff with common proof as to all class members.

Now, plaintiff's quest to prove her claims on a class-wide basis cannot survive the rigors of the analysis articulated in the court in the *Dukes versus Wal-Mart* case. This is so because the reports, the PTCRs, are created using information from different sources, many of which are not DPPA-protected, and this is true even if -- even if the driver's license and the registration are considered to be motor vehicle records. That's an issue that's pending before the Court at this moment.

Now, surely if the Court were to conclude that the driver's

license and the registration, even the bar codes on them, were not motor vehicle records, we don't think even the plaintiff would argue that this case would be suitable for class certification. But the plaintiff argues that it can establish that the origin of the PTCRs can be proven by common proof because plaintiff has offered a common proof of the training provided to law enforcement's officers in preparing these reports.

First, they offer -- they offer evidence, they say, that all -- that officers are trained to first ask for a driver's license, a registration, proof of insurance, and to confirm with the driver that the information on the documents is correct. And second, they contend that their common proof is that most officers -- 90 percent, they say -- are trained to use SECTOR to then complete the PTCR the report.

Now, it's undisputed that SECTOR is an application. It's simply a template that's on the computer. It does not have a direct link to the Department of Licensing. In fact, you can use SECTOR even if you don't have an internet connection. But plaintiff emphasizes that SECTOR is how the PTCRs are created.

Plaintiff tells the Court that the common proof will establish that the source of the information on the PTCRs is the motor vehicle record, which is its burden. But what is the common proof? I'll remind the Court that there's -- there's no data that exists that -- as to whether the information on

SECTOR, which creates the PTCR, came from a scan or from a manual input. Admittedly, there is a -- there is a modest dispute about -- about whether there is some code that could be recreated that could tell you whether the driver's license and registration were actually scanned.

We submit that the testimony offered by plaintiff was by Carla Weaver, who was a DOL 30(b)(6) designee. She admitted in the testimony that we provided to the Court that she just thought she remembered this fact from a training she attended. She deferred to the State Patrol, who manages the SECTOR program. She deferred to the State Patrol. And in particular, she deferred to a -- someone at the State Patrol called Tania. We then offered the declaration of Tania Johnson, who said there is no way to determine if the PTCR prepared on SECTOR was created through a scan.

But even if it was scanned, even if the license and the registration were scanned onto SECTOR, the prepopulated fields can be manually changed with information gathered from another source, and it's undisputed -- undisputed that there's no way to determine if there was a deletion in any of those fields, and it's undisputed that there's no data that exists whether information from an access or driver's return was used to populate the PTCR.

Now, admittedly, they can recreate data about whether a driver's return was called, either called to dispatch or

accessed on the computer, but once -- if the information is received, usually it's simply to validate the information they otherwise did receive. There's no data that will tell us whether the access or the driver's return was used to populate the report. No common proof -- no common proof will show the source of the information on the report.

Our position is not that plaintiff must prove her case with certainty at this stage, but at this stage, the plaintiff must show the Court how she intends to prove liability with common proof, and she cannot do that because the common proof she claims that she can establish does not prove liability. We don't dispute that by and large, officers receive the training to ask for the driver's license, the registration, and the proof of insurance; and if they use SECTOR and the driver's license and registrations are available, the driver has them and they're not damaged and they are scannable, they are trained to scan these documents into SECTOR. But the problem that plaintiff has is that this training does not prove liability.

First, the class definition includes handwritten reports, handwritten PTCRs. In that case, there's no evidence that SECTOR was even used. Second, there's no way to know if the training that the officers received was actually employed in any particular case for any particular report. The testimony before the Court shows that documents are not always scannable.

Third, even if the officer did use SECTOR and did follow

his or her training and the license and the registration were scannable and scanned, that does not establish that the source of the information was any of those documents. It does not establish liability. Why? Because the officers ask the driver if the information is -- is correct. If they follow their training, that's what they'll do. And if the information is not, then they'll get the information from other sources. And the officers can then -- and what do they do? They change the information that's been scanned in if they do it.

Every witness agrees with this. Every witness agrees, and it is precisely what happened with the plaintiff herself. The fact of the matter is that the address on her driver's license is not the address on the report. It was manually typed in. And so even if the officers do follow their training, this is not common proof of liability.

It's not our position that plaintiff has the burden at this stage to prove that the information on every report came from a DOL record, but it is her burden at this stage to show that there's a way that she can prove this at trial with common proof; and, Your Honor, she's not done that, and we submit she can't do that.

I'd like to talk about some of the facts before the Court, and I thought -- I've got a four-page document that simply -- that doesn't summarize; it just pulls out some of the information that's in the court record. One of the documents

was filed under seal so I didn't want to put it up on the Elmo, but I thought I'd pass it out.

THE COURT: All right. Can you give me a cross-reference to the ECF number?

MS. DUFFY: It's on the document.

THE COURT: Oh, I see. Thank you. So that's ECF No. 90. All right.

MS. DUFFY: Now, first before I talk about the handout, there's obviously some information on these PTCRs that comes from the driver themselves or from other unprotected sources. The phone number, the insurance information, how the accident happened, there's obviously an interview.

Now, when asked if there was any way someone could determine the source of these PTCRs by simply looking at it, every single witness gave the same answer. No, it's impossible. When asked if there was a way to determine if the PTCR was created -- was created by a scan on SECTOR, the answer was generally the same: No.

Now, there's no way for plaintiff to prove that the officers actually followed their training; that's not documented. And there's no way for plaintiff to prove that the officers actually scanned the information -- excuse me, and the only way for plaintiff to prove that if the officer actually did scan the documents into SECTOR and the information on the report is reflected by the documents that were scanned is to simply ask

the officer who completed the report.

And those asked who testified before the Court said that even if they did scan the documents into SECTOR, if it was wrong, they would change the information. They would just delete it. And to do that, they would look to many sources, using any number of resources, including the proof of insurance, the drivers themselves, a passenger, maybe a witness statement.

And there is no common proof that will tell us whether what they scanned was changed, and if it was changed, what was the source of the information, because there's simply no way to reconstruct from data whether the driver's license, registration, or driver's return was used to create the record. And there's no way to know if the source of the record -- report was a driver's license, a registration, a driver's return, the driver themselves, a passenger, the insurance card, or a witness statement. We would have to go driver by driver, report by report.

The testimony before the Court makes this clear. We've got deposition testimony from the 30(b)(6) designees. They all say this; Morhous, McGee, Moon. There's just no way to know the source of the PTCR. And as for access, the driver's return, they're not commonly used, but when they are used, generally to verify the information that the officer already has. And while there may be a way to identify whether an access was -- whether a driver's return was made, there's just no way to bring it back

to the report.

Now turning to the handout, in addition to the testimony by the 30(b)(6) designees, other officers who are doing this every day day-to-day here in the Spokane area shared their testimony, and just look at it closely. The first page is the declarations of Zachary Dahle, who reviewed the first PTCR; he's here in Spokane; Sergeant Lasher, who reviewed the second PTCR, also in Spokane, he's a State Patrol; and the third is David Thornburg, who's been around with the Spokane Sheriff's Department, the police department. All of them say that there's no way to know from the PTCR if -- what they did and what information they used and that they often use and they do use -- when they're creating accurate information in the PTCR or correcting something that they type it in and they use other sources.

The plaintiff's own records make our point, and to demonstrate it most clearly, we ask that the Court consider that first PTCR. That's ECF 62-4. It's Exhibit 16 to the Kirchofer dep. And in particular, take a look at the second page of the handout. This is simply a summary of some of the statements in Officer Ferguson's declaration, which is ECF 88 before the Court.

Here's what Officer Ferguson says about the PTCR that he created. He says when he investigates a collision, he brings with him a notepad. Every officer who testified said that; that when they go to the driver, they have a notepad with them. He

jots down information given to him by the driver. That's Paragraph 3.

Now, in this case, there is no dispute before the Court that the address on plaintiff's driver's license was different than the address on the PTCR that plaintiffs have submitted to this Court. And -- and in that event, look at what Officer Ferguson says he would do if the driver's license is different. This is what he would do. At Paragraph 6, he says, "I would have obtained the address shown on the report from Ms. Wilcox herself and typed that information directly into the collision report based on my typical practice."

Now, if her address was not reflected on her driver's license, he would have written down the right address on his notepad, and he would have typed it in. So as for the 2015 PTCR for plaintiff, there's individualized evidence that her personal information did not come from her driver's license or her registration, but it came from her own lips. And if Officer Ferguson is to be believed in this situation, there was no DPPA liability, and plaintiff herself falls out of the class for this first PTCR.

Now, while Officer Ferguson does not remember if he followed his training, if he scanned in her driver's license or registration, but what he -- but that is -- that is what he would have done. That was what he was trained to do. But even if the training he -- was followed, there's no way to know if

the source of the address on this document was her driver's license, her registration, or, least likely, a driver's return. And as Officer Ferguson says, it probably came from her own lips.

Now, as for the new address box, you'll notice in that PTCR it is not checked. He didn't check the address box. Yet the address on the driver's license is different than the one -- we know that it was not her correct driver's license, and we know that it was changed on the -- on the PTCR. Officer Thornburg tells us that the absence of new address boxes is common.

But there's so -- but the point simply is that there's no easy way to use this new address -- address box, excuse me, to cure the problems with plaintiff's case. We simply couldn't exclude those with the new address box checked because if we did that, we would not have excluded this one; and we know for a fact that the driver's license address is not reflected on the report.

Now I want to talk about the second collision report, the second PTCR. That's ECF 65-2, Exhibit 17 to the Kirchofer dep. Now, here there are two drivers on that report. There were two on the first one. And by the way, you'd need to do this analysis for every driver on every report. So we know that the address on the -- you can see from that document that the new address box was checked; so that tells us that the record, the report, does not reflect the address on the driver's license;

and it raises the question, of course, so that, well, what was the source of that information on the PTCR?

Well, we know through discovery that plaintiff gave a witness statement in connection to this collision, and I'd like to turn the Court to the third page of the handout. This is the document that was filed under seal, and -- and the version in front of you, of course, is unredacted. It was filed in redacted form. Now, you can see from this document that all of the information at issue in this case is there. In Jade Wilcox -- in plaintiff's own hand, it's information that she gave to the officers.

Now, like Officer Ferguson, Officer Stevens does not remember how he completed the PTCR or whether he scanned the driver's license and registration into SECTOR. But if you turn to the last page of the handout, just excerpts of Officer Stevens' declaration, look what he said; that while he doesn't remember the event, he was able to reconstruct it by looking at his dash cam. He also said he looked at his e-mail. And what he -- what he remembered after reviewing these documents is he obtained some information from -- from Sergeant Lasher, the driver's license and the registration.

He also says that if the information on the driver's license was not correct, he would delete the prepopulated field if it was scanned in, and he would type in the information. And he tells the Court that there are multiple ways to gather

driver's information to complete the PTCR; and if there's no driver's license or the driver's license on the -- excuse me, or the information on the driver's license is not current, as is here, that he will get this information from some other source.

And at Paragraph 6, he tells the Court those other sources: verbally from the driver or maybe a passenger. He might get the information from another officer. He might get the information from a witness statement or proof of insurance. Admittedly, he might get the information from the registration or a driver's return. But he tells the Court that he does not recall the source of the information that he used when he input that. It could've been any of them.

Now, the point here, Your Honor, is that plaintiff has not established that the source of the information of either PTCR before the Court was a motor vehicle record. On this record, a trier of fact could find that the source of the information for both these PTCRs was not a motor vehicle record. That is even if -- even if the Court finds that the driver's license or the scan bar or the registration of the scan bar was a motor vehicle record, and the outcome could be different for the two different records.

But it's not surprising to us that plaintiff has not yet -- has not moved for summary judgment on this issue of whether the source of the information on these records was a motor vehicle record because, of course, on these facts, it would be futile.

Class-wide proof will not establish liability in this case, and the SECTOR training for the -- the PTCR does not save plaintiff's claim to the contrary.

THE COURT: Ms. Duffy, may I ask a question?

MS. DUFFY: Sure.

THE COURT: It strikes me that you are somewhat conflating two issues. One is being able to identify the members of the class, which the handout and your argument about what the source was of the information going into the report would lead to individualized concerns, versus the issue of commonality of the legal issues and the proof to prove defendants liable; that is, once the Court decides whether or not such information is protected, then whether or not defendants are liable for using that information for members who have been properly identified as being in the class.

So in other words, you're talking about the addresses, the source of the information to argue that there's no commonality of evidence on the liability issues, but it strikes me that the argument about the source of the information is going to be an issue that has to be resolved in identifying the members of the class.

MS. DUFFY: Well, it's because of the way the plaintiffs define the class that it does -- it does relate to both. And while -- while the class -- while plaintiffs have presented ostensibly an ostensive measure to identify the class,

those whose personal information was derived from a motor vehicle record, the problem is that it requires a deeper dive and individualized inquiry to -- to figure that out. It is the same issue. It is the same issue on liability, and I think what plaintiff does is they sort of gloss over it.

And I want to talk about the *ConAgra* case because I think that's where they do that is they -- they confuse the issue of determining who gets to share in the -- in the class once liability is established, once the damages are established, and -- and how do you identify the people who can share in the -- in the proceeds versus how do you even establish the pot? And in this case, you don't even get to what the damages are until you determine that the information on the -- on the -- on the collision report was actually derived from a motor vehicle record.

So, I mean, two things there. I mean, I think the plaintiff would have the Court believe that, "Look, once you decide this legal issue about, you know, the driver's license and the registration, then we're home-free. I mean, that's the common issue." But they're not, and that is our point is that you could decide that. You could decide, like the *Pavone* case did, like the *Meyerkord* court did, that a driver's license is a motor vehicle record. You could decide that.

But -- but the common training that has these officers asking for the driver's license, asking for the -- the

registration, that doesn't prove liability because we know by every officer who's testified that what -- even if it is scanned -- and it often isn't. But even if it is scanned, what was scanned is not what was reflected in the -- the collision report.

And -- and to plaintiff's counsel's, you know, kind of hack or a solution to this problem about, "Well, we could just go to the DOL and we could just see who whose address has changed," that won't work; two reasons. One is you still have to go driver by driver, report by report; and secondly, look at -- look where that would lead us with plaintiff. I mean, Officer Ferguson -- I mean, if you -- and we know it's circumstantial, we know it's inferential, but we have to acknowledge that there's a factual dispute there about the source of that address. And what he says is, "I got it right from her lips. I wrote it down."

And the DOL's license would probably have for registration the same -- the same -- the same address as on that PTCR, but he says he got it from her unprotected source. So even if Your Honor decides that the registration is protected, that PTCR, there's no liability, and that's our point. The practice only gets them so far. The training only gets them so far. It does not establish liability, and they have to come to the Court with common proof of liability, which is what happened in the *ConAgra* case, which I'll -- which I'll talk about now if you'd let me.

THE COURT: Certainly.

MS. DUFFY: In the *ConAgra* case, plaintiff's right. It was a consumer class action alleging that ConAgra misled customers by falsely labeling Wesson oil as 100 percent natural when in fact it was made with GMOs.

In *Briseno*, the case was addressing whether plaintiff had to identify every class member who could share in the recovery once the damages were determined after liability was determined. In fact, the court discusses how other courts have allowed for claims administrators, auditing processes, sampling, fraud detection to validate claims, to validate claims. It even cites the *Comcast* case, the U.S. Supreme Court case, that the "need for individualized damages determinations after liability has been adjudicated does not preclude class certification."

And at Page 1132 of the *Briseno* case, the court makes very clear that plaintiff had proposed to prove ConAgra's aggregate liability using common proof. What they planned to do is show that the difference in price between 100 percent natural and made with GMO was X, and they could -- they would get that with their experts; and through discovery from ConAgra, they would -- they would determine how many people bought the 100 percent natural oil; and from that, they'd simply multiply the difference by the purchases, and they would have a pot.

And then the issue was, Okay, who's going to share in the pot? And ConAgra argued, "No, no, no. You can't ascertain

these people because, you know, they don't have receipts. How are you going to prove it?" And -- and that's when they argued for this -- this additional hurdle to class definition about the administrative feasibility. That is not what we're arguing. We know that. The Ninth Circuit does not accept that.

But -- but what the Ninth Circuit does require is common proof on liability. And in the case of *ConAgra*, even if once the -- once the pot was determined, even if they couldn't figure out everybody who bought a Wesson oil, well, that's what the high price is for. So they'll just take the pot, which is determined by liability, and then the rest will go to cy pres.

But here, you don't get to the pot. You don't get to $2,500 per until you establish that -- that each one of those reports was derived from a motor vehicle record, and -- and the evidence here is that even if the police officers follow their training, there's more to it than that, and it requires individualized proof. This is the fallacy of plaintiff's argument.

Here, the individual issues predominate over the issue -- predominate on issues of liability; so there is no cure to the problem. And in addition to the -- the issue of identifying class members objectively, well, plaintiff suggests that we can simply sort this out in some sort of administrative process, that we can just sort it out after liability; we can let people make claims. But she fails to -- to articulate how, when, by

whom. I mean, certainly we would want to know if that person submitted a witness statement like the exhibit that's in front of you, like Jade Wilcox's own witness statement. We'd want to know that for each -- each person. That's liability.

And how then would the defendants' due process rights be protected under a system where the Court just says, "Yeah, there's a common issue here. Everybody's 2,500 bucks, and now we'll sort out -- we'll sort out who gets paid what." I mean, it simply doesn't work in this scenario, and this case does not apply.

Briseno does not apply or *ConAgra* does not apply simply because of the issue of liability. I mean, that's what we're debating. That's what we're concerned about is not so much -- I mean, it's a similar issue because of how the plaintiffs define their class. They frankly did us a favor with how they define the class, but it's -- it's the same issue.

Finally, I'd like to address the *Meyerkord* decision, which belittled by plaintiff, it's very much on point, and -- and this is a -- well, *Meyerkord* was -- is the only case in the country that addresses Rule 23 in the context of the DPPA concerning collision reports. It's the only case that addresses collision reports in the context of the DPPA.

Now, in *Meyerkord*, plaintiff was attempting to certify two classes, two. One was a statewide class related to names of drivers on collision reports obtained by a law firm for

marketing purposes. Importantly, Your Honor, non-drivers were excluded from that class. That's a distinguishing point for plaintiff here, but it's not -- it's false. I mean, in the statewide class, non-drivers were excluded. The second class was a national class of anybody whose name was on the report, and that was against the outfit that created the software that the reports were generated by, and then they apparently were selling these reports.

The court denied class cert. for both, finding that plaintiff failed to satisfy the requirements of Rule 23, specifically commonality, predominance, and typicality, because the individual facts concerning whether the source of the information on the collision reports was -- was obtained from a motor vehicle record, precisely what we're saying to the Court here.

Now, some background on *Meyerkord* or *Pavone*. Plaintiff claimed that the driver's license was the source of the personal information on the collision report. The district court in the -- in *Pavone* had already found that it was, that the driver's license was a motor vehicle record, the same position plaintiff takes here. Now, in *Pavone*, plaintiff claimed it was a best practice in the policing profession regarding how the reports should be created using these driver's license as the source of the collision report.

Plaintiff argued that there was a -- that a common practice

was sufficient to meet its burden to show to the court that it could prove that personal information on the collision reports was derived from the driver's license, and the plaintiff argued having made that showing of common proof that it was now defendant's responsibility to demonstrate that this best practice was not followed and the defendant must prove that the report was not created using the driver's license. Much like in *Meyerkord* plaintiff's points here, plaintiff points to common proof of police training in Washington to avoid this individualized inquiry.

But despite the evidence offered of best practice, the *Meyerkord* decision recognized what we ask the Court to do here; that even if the protocol or the best practice or the training was followed, the common proof, this does not prove liability, and it -- it does not prove that the source of the information on the report was the driver's license or some -- or whether it was some other source. Like here, in *Meyerkord*, there was evidence before the Court that showed that no two crashes are going to be exactly the same, and there were too many variables, individual situations. We have that testimony before the Court in our briefing.

Like here, in *Meyerkord*, there was evidence before the court that sometimes officers create reports on computers, sometimes by hand; sometimes officers use information from handwritten statements or databases or from the parties

themselves, the drivers themselves. The testimony in our case from every police officer or trooper who testified is the same.

You just can't tell by looking at it what the source of the information was; and there's no way to determine if the report, the PTCR, was created using a scan, which -- and it's not unusual for drivers not to have their license, registrations, or for them to be unscannable. And if there's -- if there's no scan, the source of the information could be a number of things: the drivers themselves, proof of information, other things.

But even if there was a scan of the driver's license and the registration or the driver had those documents and the information is -- is not correct, the officer simply deletes it and he adds information from other sources; and those sources could be those protected by the DPPA, but the evidence before the Court is the sources could be those not protected by the DPPA, such as insurance cards, drivers themselves, witness statements.

And finally, like here, the *Meyerkord* found that the centralized software program used to create and distribute these reports did not track how the source of the content gets onto the crash report. That's what we have here. It's -- there's no -- nothing -- no way to track that. The Court then found that the plaintiff could not satisfy Rule 23(b) because "individualized questions pertaining to how each officer gathers information to create crash reports would predominate over the

common questions in the case."

We ask the Court to follow and to do the same thing as the *Pavone*, the *Meyerkord* did -- case did and find that plaintiff here has failed to establish that she can prove that the source of the personal information on the reports is a motor vehicle record and that she can do so under common proof, not on this record before the Court. On the record -- on the record before this Court, plaintiff cannot even establish that the information on her own records was derived from Department of Licensing records.

The Swapp Law practice of purchasing these reports is done. It's been done since 2016. They don't do it anymore. But the -- as we put in our briefing, the State Patrol has sold over 270,000 reports to these uninvolved parties, people like the Swapp Law Firm. Other law firms have purchased 40,000 of these. Some other -- one single law firm in -- in the record we've established has -- has purchased over 40,000 of these -- of these same records. This was done. These were records that were sold by the State Patrol. They were pre-redacted.

Before the Court subjects this law firm to over $40 million in liability through this class action, it should at least put plaintiff to the burden of showing it can establish liability through common proof, and it should at least do so in a way that protects the defendants' due process rights to make its case. And -- and we submit on the record before this -- before this

Court there's no way to do this using common proof. It requires an individualized report-by-report, driver-by-driver analysis. It's clear in the record. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Barton, would you care to have rebuttal?

MR. BARTON: Yes, Your Honor.

THE COURT: All right.

MR. BARTON: Your Honor, the defendants start with two cases which I think are illustrative of where they go. They start with the *Zinser* case, which is a products liability case. The Ninth Circuit affirmed the denial -- denied certification there because of problems with establishing individual issues of causation and then the fact of damage, which is common. Products liability cases don't get certified. I don't think that is a good place to start.

The second case that they cite or rely on from the -- from an appellate court is the *Wal-Mart* case, and the problem with *Wal-Mart* is that the Supreme Court found there was a -- and admittedly, it was a lack of policy and a lack of uniform practice. That's what the plaintiffs were challenging in that case is the lack of any policy or practice; and that, the Supreme Court said, does not create certification. Now, it also was an attempted certification under (b)(2) and not (b)(3), which has more rigorous standards than (b)(3).

The defendants make the statement that there's no way to

tell if something is scanned or a handwritten report. That's actually not accurate. Officer Gibbs testified -- and that's submitted as Exhibit 4 about the numbers and identifying letters on collision reports, and this is 8, 13, 15 and 16. And he goes through and explains that there are codes as to whether or not they were handwritten reports or -- the reports were created in a handwritten form or by the SECTOR; so there is a way to distinguish between those reports.

The second thing that the defendants entirely ignore is the testimony by Carla Weaver, and this is Exhibit 19 on pages -- Page 123. And I asked her the question of whether or not the Department of Licensing keeps records of how long -- of whether a driver has updated his address, and they do, and they have it going back seven years. And what defendants completely ignore is it -- what is the problem of taking a driver's license -- I'm sorry, an accident report, looking at the license, and comparing whether or not it matches up what the Department of Licensing had either as the registration address or the driver's license address?

If you do that -- and we know that there are standard procedures of how these forms are created. That will give you a pretty good -- I think a highly reliable way to ascertain whether or not the information on the collision reports came from DOL data, either driver's license, bar code data, or the driver's license. We will know that. And what defendants focus

on -- and I think you have to listen closely to what they say -- is if the driver's license bar code data or the driver's license information is not available, if it's incorrect, the driver -- the officer will delete the information and change it.

So this, to me, provides a very good way of matching up, at least for anybody -- if their address was -- had been updated with the -- and matched with the Department of Licensing and that matches the accident report, that, I think, provides -- and given the standardized procedures of what they do and if the driver's license -- they use the registration first, driver's license second from the scan or from the front of license. If that matches what's in the Department of Licensing database and the address history matches up, I think we have a very good certainty that that's how the officer created this report, particularly anything that was created by SECTOR.

The defendants repeatedly have a mantra of "You have to look at every single person, and unless you do that, you can't have liability here." I think if you look at the *Tyson Food* case, that contradicts their argument. And what *Tyson Food* -- the *Tyson Food* case was about, it was what is called a donning-and-doffing case. And I don't know if you've had any of these here, but they have been common under the Fair Labor Standard Act.

And what -- the practices of a number of employers that require significant -- their employees to engage in significant

-- what was unpaid time essentially to get ready for work, to put on special -- "clothes" is probably not even the right term for it, but special things that they need to wear that take significant time to put on and take off because of the nature of their jobs, and the question was whether or not that time was compensable.

And Tyson Food didn't have records, and there was a question of whether or not all employees should be included and who -- who would be included. And what the plaintiff ultimately relied on is an estimate in terms of -- of a proxy for some number of people that would've been included, would've exceeded the time or minimal time, and so that came up with an aggregate award. And as part of that -- now, on appeal to the Supreme Court, Tyson Food argued that there were people who were not injured as part of the class and that that undermined class certification, and the Supreme Court rejected that.

There is also a second way that damages could be awarded in this case. It does not require that you have an aggregate liability amount to the class. You could make an individual -- you know, a per-class-member award and then come up with a determination, but there's also a way -- the defendants assume that we could not do the analysis of the reports and the DOL address like history data pretrial. There's no reason we couldn't do that before. If the Court required us to do that, we could do that, and that would be -- serve as a very good

proxy of who should be included in the class.

Now I want to talk about defendants' argument about Ms. Wilcox specifically and what they contend makes her atypical and that she somehow illustrates that she -- or she's not a proper representative because of her personal collision reports. What they rely nearly exclusively on are -- well, probably a combination of the declarations by the officers and then some assumptions that they make, and they ignore Ms. Wilcox's testimony, but if you look at each of the declarations -- and we can start with Officer Ferguson.

The defendants present what Mr. -- Officer Ferguson and Officer Stevens as having some memory of what they did specifically with respect to Ms. Wilcox and how they created the report. That's not the case. What they do and they both said -- and with respect to Officer Ferguson, what he says in Paragraph 3 of his declaration, he says, "Ms. Wilcox's collision report is one of just a few that I have prepared over the past several years." Then he says, "While I don't have a specific recollection of how I prepared the collision report..." That's what he says. He doesn't have a recollection.

He then goes on, and the rest of his declaration is essentially speculation about what he did and what he may have done. "I typically do this," "I may have done that." If you look at Paragraph 6, I think it is illustrative. He says, "I have been informed," doesn't say from whom, "that the address on

her then current driver's license does not match the address shown on the collision report."

What -- and what this glosses over, what the defendants gloss over is the address on her registration on -- in both instances did match the collision report; and given the standard procedures and the preferences, it is go to the registration first, then the driver's license. That's what the officers are instructed to do.

So after he says that, he says after the address -- he was told that the driver's license doesn't match the address shown on the collision report. He does not mention anything about the registration, but he then says, "Assuming that is the case, I would have obtained the address shown on the report from Ms. Wilcox herself." There's nothing in there -- he's apparently not asked or told anything about the address on the registration statement.

Likewise, Officer Stevens at Paragraph 4 of his declaration says, "I do not specifically recall how I prepared the collision report for this incident," meaning Ms. Wilcox, "or what information I used." That's what he says. He doesn't recall. Ms. Wilcox did testify she did recall. So these are not competent ways to rebut Ms. Wilcox's testimony.

What they then do is speculate how they might have done it based on a variety of things, but that does not rebut Ms. Wilcox's testimony in terms of what she in fact gave, that

she confirmed that her registration was -- address was accurate; and there's no dispute that that -- the registration -- her address on her registration matches what's on the collision report, and there's no dispute that the address on her registration was up-to-date. No one disputes that.

Given the practices, I think the logical conclusion that any fact-finder could draw is that's where the information came from, and she states that she did not provide other information. And given the -- the standard procedures, an officer -- the standard procedures and training would say the officer should take it off of a registration state -- off the registration bar code data or the front, take it off the driver's license bar code data or the front before he looked at an insurance card, before he looked at a witness statement, before he looked at anything else.

The defendants made a statement that plaintiffs have not moved for summary judgment with respect to the issue of a driver's license and a registration being -- or the bar code data being motor vehicle records. There's a reason for that, and that is plaintiffs do not move for summary judgment prior to the time the class is certified because there is a principle called one-way intervention; and defendants often object that if we move for summary judgment, it allows absentee class members the opportunity, which is unfair to the defendants, to come in only after a significant portion of the case has been decided.

That's why we have not moved.

With respect to the *Pavone* case, defendants emphasize the existence of a best practice, but what they ignored is what is a best practice versus actual training, actual procedures at a specific law enforcement training -- training program or law enforcement manual. This is what -- if you look at Note 5 in the *Pavone* case, Footnote 5, what the plaintiff relied on is his best practices. It says, "The plaintiff sets forth the National Highway Traffic Safety Administration's model minimum uniform crash criteria and the state of Illinois traffic record assessment."

That's where the best practices comes from. It is not a systematic training program. It is not an official manual that the Washington State Patrol has put down or that all their law enforcement officers use across this state. It's significantly different.

I think the defendants repeatedly say there are many sources as to the source of the data. There really are not. I mean, there are two that matter; the bar code data, the registration, and the license. What the defendants want and what they keep saying is there needs to be a way to identify, and I think Your Honor's question goes to the heart of this is -- and if you look back at the *ConAgra* case, perfection is not required. What we have to have is a reasonable way for a juror, for a fact-finder to come in and make a determination of -- that

there is a reasonable approximation that this happened. Perfection is not what's required by the Ninth Circuit. It's not required but was required by the Sixth Circuit.

One further thing, just one small point, Your Honor. The defendants on the prior motion and this motion have thrown around $40 million of liability. That's something they've come up with. It is not a number the plaintiff -- anywhere from the plaintiffs. It's not a relevant consideration for -- for class certification. Unless Your Honor has any other further questions, we request you certify this class.

I would like -- I'm sorry. I would make one further point. I think this is not something the defendants have actually raised in their papers, but they have sort of suggested there's some problem with the class definition. This Court, if they think there's some tweaking that needs to happen for the class certification, the -- I believe the Ninth Circuit has said the Court has the authority to essentially modify the class -- class definition as it deems appropriate if there's something specific within the class definition. So if -- rather than denying class certification, if there's something that needs to be modified, that's what the Court should do; modify the class definition and certify the class. Thank you, Your Honor.

THE COURT: All right. Thank you, Counsel. I will issue a written order. Court's adjourned.

(Court adjourned on December 13, 2018, at 11:05 a.m.)

C E R T I F I C A T E

I, ALLISON R. STOVALL, do hereby certify:

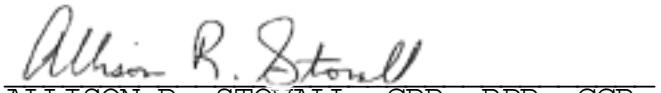
That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Spokane, Washington;

That the foregoing proceedings were taken on the date and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true, and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings;

DATED this 1st day of February, 2019.



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